No. 138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Petitioner*

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
INTRODUCTORY	1
QUESTION PRESENTED	2
STATEMENT	2
1. The nature of the litigation	2
2. The proceedings below	4
3. The petitions for writs of certiorari	8
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. Judge Medina's Participation in the Decision Below Was Expressly Required by Statute	10
II. The Propriety of Judge Medina's Participation in the Decision Below Is Fully Supported by Established Principles of Law	15
III. Practical Considerations Also Support Judge Medina's Eligibility	20
IV. Judge Medina Was at Least a Judge *De Facto* and the Propriety of His Participation in the Decision Below Is Not Open to Attack Here	25
CONCLUSION	27
Appendix A—Cases in Which En Banc Proceedings Were Commenced in the Year Ending June 30, 1959	29

TABLE OF CASES

American Eastern Corporation v. *United States*, 133 F. Supp. 11 (S.D.N.Y., 1955), *affirmed without opinion*, 231 F. 2d 664, *cert. denied*, 351 U.S. 983 ..... 5, 23

Ball v. *United States*, 140 U.S. 118, 128-129 (1891) 9, 25

Bishop v. *Bishop*, 257 F. 2d 495, 501-502 (3 Cir., 1958), *cert. denied* 359 U.S. 914 14

Brunswick Village v. *Knof*, 29 N.J. Super, 238, 102 A. 2d 383 (1954) 18

Case v. *Hoffman*, 100 Wis. 314 26

Page

Cheesman v. *Hart*, 42 Fed. 98, 105-106 (Cir. Ct., Colo., 1890), *cert. denied* 163 U.S. 704 18
Commercial Nat. Bank in Shreveport v. *Connolly*, 177 F. 2d 514 (5 Cir., 1949) 14
Cumberland Telephone & Telegraph Co. v. *Kelly*, 160 Fed. 316, 321 (6 Cir., 1908) 16
Ex parte Ward, 173 U.S. 452, 455-456 (1899) 9, 25
Fisher v. *Puget Sound Brick, Tile & Terra Cotta Co.*, 34 Wash. 578, 76 Pac. 107 (1904) 18
Frad v. *Kelly*, 302 U.S. 312, 316-317 (1937) 8, 18, 26
Globe & Rutgers Fire Ins. Co. v. *Draper*, 66 F. 2d 985, 991 (9 Cir., 1933) 16
Harmar Drive-In Theater, Inc. v. *Warner Bros.*, 241 F. 2d 937 (2 Cir., 1957), *cert. denied* 355 U.S. 824 .. 14
Herzog v. *United States*, 235 F. 2d 664, 670, n. (9 Cir., 1956), *cert. denied* 352 U.S. 884 14
Hicks v. *United States Shipping Board Emergency Fleet Corp.*, 14 F. 2d 316, 317 (S.D.N.Y., 1926) 18
In re Big Blue Min. Co., 16 F. Supp. 50-52 (N.D. Cal., 1936) 16
In re Sawyer, 260 F. 2d 189, 203, n. 17 (9 Cir., 1958), *reversed on other grounds* 360 U.S. 622 14
In re Woodside-Florence Irrigation District, 121 Mont. 346 27
Isbrandtsen Co. v. *Johnson*, 343 U.S. 779, 783 (1952) .. 16
Langnes v. *Green*, 282 U.S. 531 (1931) 27
Miller v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932) 8, 16
G. H. Miller & Company v. *United States*, 260 F. 2d 286, 292, 305-307 (7 Cir., 1958), *cert. denied* 359 U.S. 907 ..... 13, 14
Reardon v. *California Tanker Company*, 260 F. 2d 369 (2 Cir., 1958), *cert. denied* 359 U.S. 926 14
Ross v. *Jones*, 89 U.S. 576 (1875) 8, 16
Schwartz v. *Inspiration Gold Mining Co.*, 15 F. Supp. 1030, 1034 (Mont., 1936) 16
Shore v. *Splain*, 258 Fed. 150, 151-154 (D.C. Cir., 1919) 8, 16, 25
State v. *Bobbitt*, 215 Mo. 10, 114 S.W. 511 (1908) 18
State v. *Butner*, 67 Nev. 436, 220 P. 2d 631, 632 (1950), n. 2 17
State v. *Fidelity & Deposit Co.*, 136 Mo. App. 330, 117 S.W. 618 (1909) 18

Page

State v. *Stevenson*, 64 W. Va. 292, 62 S.E. 688 (1908) 17
Sunrise Mayonnaise v. *Swift & Co.*, 88 F. Supp. 187, 189 (E.D. Pa., 1949) 18
Sword Line, Inc. v. *United States*, 228 F. 2d 344 (2 Cir., 1955), *affirmed* 230 F. 2d 75, *Affirmed as to admiralty jurisdiction*, 351 U.S. 976 5, 6, 23
Textile Mills Sec. Corp. v. *Comr. of Int. Rev.*, 314 U.S. 324, 326, 335 (1941) 9, 11, 13, 15, 20
Thompson v. *United States*, 246 U.S. 547, 551 (1918) 15
Thummess v. *Von Hoffman*, 109 F. 2d 291, 292 (3 Cir., 1940) 16
Two Guys from Harrison-Allentown, Inc. v. *McGinley*, 266 F. 2d 427, 430-431, n. 1 (3 Cir., 1959) 25
United States v. *Carnigan*, 342 U.S. 36, 38 (1951) 27
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 330 (1936) 27
United States v. *Garsson*, 291 Fed. 646, 647, 648 (S.D. N.Y., 1923) 18
United States v. *Gordon*, 253 F. 2d 177, 191-192 (7 Cir., 1958), *reversed on other grounds*) 344 U.S. 414 14
United States v. *Marachowsky*, 213 F. 2d 235, 244 (7 Cir., 1954) 18
United States v. *Sentinel Fire Ins. Co.*, 178 F. 2d 217, 239 (5 Cir., 1949) 14
United States v. *Silverman*, 248 F. 2d 671, 696 (2 Cir., 1957), *cert denied* 355 U.S. 942 2
United States v. *Thomas*, 82 U.S. 337 (1873) 9, 16
United States v. *United Steelworkers of America*, 271 F. 2d 676 (3 Cir., 1959), *affirmed* 361 U.S. 39 2
United States ex rel. Paetau v. *Watkins*, 164 F. 2d 457, 459-460, n. 1 (2 Cir., 1947), 28 U.S.C. 296 8, 18
Watson v. *Payne*, 94 Vt. 299 26
Western P.R. Corp. v. *Western P.R. Co.*, 345 U.S. 247 (1953) 15

STATUTES

Merchant Marine Act, 1936, 46 U.S.C. 1199(a), section 709(a) 2, 3
Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1735 *et. seq.* 2
28 U.S.C. 45 12

	Page
28 U.S.C. 46	8, 9, 10, 11, 13, 15, 19, 21, 24
28 U.S.C. 294	13
28 U.S.C. 296	12, 13, 18, 19
28 U.S.C. 371	22, 23

MISCELLANEOUS

245 F. 2d VIII	6, 23
264 F. 2d VIII	12
268 F. 2d XII	12
H.R. 6159, 86th Cong., 1st Sess.	12
House Doc. No. 321, 86th Cong., 2d Sess., pp. 4, 6, 7, 8, 9-11	19, 24
28 Who's Who in America, 1954-1955, p. 485	12
New York Times, August 28 1959	12

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

INTRODUCTORY

The brief for the United States adequately cites the opinions below, the jurisdictional requirements of this Court, and the relevant statutes. These matters are therefore not repeated herein.

[1] This brief is submitted on behalf of respondents Stockard Steamship Corporation; A. H. Bull Steamship Co.; New York and Cuba Mail Steamship Company; Dichmann, Wright & Pugh, Inc.; T. J. Stevenson & Co., Inc.; North Atlantic and Gulf Steamship Co.; Luckenbach Steamship Company, Inc.; Blidberg Rothchild Co., Inc.; Fall River Navigation Co. A separate brief is being filed on behalf of respondent American-Foreign Steamship Corporation.

QUESTION PRESENTED

Is a circuit judge, who (a) heard an appeal as a member of a three-judge panel; (b) participated in the decision of the court to grant a petition for rehearing *en banc;* (c) was a member of the *en banc* court; but (d) retired after the case was submitted on briefs, qualified to participate in the *en banc* decision thereafter released; or does such retirement require a reconstitution of the *en banc* court for further rehearing.[2]

STATEMENT

1. The nature of the litigation.

Respondents are steamship owners and operators who, after World War II, chartered Government-owned merchant vessels from the Maritime Commission ("Maritime") under the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1735 *et seq.*, and under section 709(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1199(a), as amended.

The charter hire paid to the Government by respondents consisted of two elements. One was called "basic hire," payable irrespective of profits or losses and computed at 15 per cent per annum of the sales price of

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[2] The Government's petition for certiorari (p. 11) referred to *United States* v. *Silverman*, 248 F. 2d 671, 696 (2 Cir., 1957), *cert. denied* 355 U.S. 942, and its brief on the merits (p. 20, n. 17) refers to *United States* v. *United Steel Workers of America*, 271 F. 2d 676 (3 Cir., 1959), *affirmed* 361 U.S. 39. No retired judge participated in either of these cases either in panel or *en banc* and their citation by the Government suggests that there is an issue in this case as to the eligibility of a retired judge to participate in *en banc* proceedings in a case with the consideration of which he has had no prior connection. This is not correct. Respondents do not urge that in such a situation a retired judge is eligible to participate in *en banc* proceedings.

each vessel. The second element was termed "additional charter hire," which was fixed by section 709(a) of the 1936 Act at 50 per cent of the "cumulative net voyage profits" earned in excess of a return of 10 per cent upon the capital required to operate the vessels.

In 1946, before the chartering program was inaugurated, Maritime proposed rates of "additional charter hire" on a sliding scale basis ranging from 50 to 90 per cent of profits, in lieu of the 50 per cent fixed by section 709(a). Respondents objected to the sliding scale proposal because it was at variance with the terms of the statute (R. 19, 120-121). The chartering program was nevertheless commenced, but the parties agreed in Clause 13 of the charter[3] that payments of additional charter hire should be made "at such times and in such manner and amount as may be required" by Maritime and should be preliminary and subject to adjustment and refund upon final audit by Maritime of the charterer's accounting. Maritime deposited the preliminary payments in an "Unearned Moneys" suspense account (R. 21-23).

Accountings for the profits and losses from vessel operations were submitted by the charterers and preliminary payments of additional charter hire were

[3] Clause 13 provided in part:

> The Charterer agrees to make preliminary payments to the Owner . . . at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required (R. 121, n.).

made over a period of years, both before and after the chartered vessels were redelivered.

Maritime did not issue its regulations governing the charterers' final accountings for additional charter hire until most of the chartered vessels here involved were redelivered. Some of Maritime's interpretations of the statute and charter gave rise to disputes with the charterers who, nevertheless, made preliminary payments in accordance with Maritime's theories, as required by, and subject to the reservation in, Clause 13. A number of these disputes remained unresolved. At final audit respondents requested refunds of claimed overpayments of additional charter hire. These were refused and libels were then filed, in each case within two years of final audit (R. 113).

2. The proceedings below.

Petitioner filed exceptions and exceptive allegations in the district court asserting that each libel was time-barred because it was filed more than two years after redelivery of the last vessel under charter.[4] The district

[4] In its opening brief to the *en banc* court the Government changed its earlier position and, with respect to the single cause of action for the recovery of overpayments of additional charter hire, asserted that the statute of limitations began to run as follows:

(a) On the date of each payment.

(b) On the date of redelivery of the last vessel, unless the redelivery preceded publication of Maritime's accounting regulations on March 30, 1950, in which case the cause of action accrued on June 30, 1950.

(c) With respect to one dispute, on February 21, 1950, when Maritime published a regulation which gave rise to the dispute.

(d) With respect to another dispute, on the date of a charter

court denied respondents' motions to amend the libels to include further allegations on the time-bar issue, sustained the exceptions and, exceptive allegations based on time-bar, held that the payments, some of which were made within two years of the filing of the libels (R. 47, 113), were "voluntary" and unrecoverable (although no such defense was raised in petitioner's pleadings (R. 17, 32, 79)), and dismissed the libels (R. 64-68, 102-103).

Respondents' appeals from the decisions of the district court were first heard by a panel consisting of Circuit Judges Hincks and Medina and retired District Judge Leibell. The case was argued January 15, 1957, and on September 25, 1957, that panel affirmed the district court dismissals, citing *Sword Line, Inc.* v. *United States*, 228 F. 2d 344 (2 Cir., 1955), *affirmed* 230 F. 2d 75, *affirmed as to admiralty jurisdiction*, 351 U.S. 976, and *American Eastern Corporation* v. *United States*, 133 F. Supp. 11 (S.D.N.Y., 1955), *affirmed without opinion*, 231 F. 2d 664, *cert. denied* 351 U.S. 983, but expressing doubt as to the correctness of those decisions, stating:

> If the subject-matter of these appeals were *res nova*, we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. 265 F. 2d 136, at 142 (R. 112)

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addendum which respondents claimed was contrary to the statute.

(e) With respect to other disputes, on June 30, 1951 and other dates.

In addition, the Government in a case pending in the District Court of Delaware stated that, with respect to some disputes, the claim for recovery of additional charter hire accrued on the date of final audit (Certified Record, 344a-346a).

Because of the obvious conflict in views in the circuit, respondents filed a petition for reconsideration *en banc*. This was granted by order dated December 19, 1957 (R. 114). The *en banc* court consisted of Chief Judge Clark and Circuit Judges Medina, Hincks, Waterman and Moore, all of whom were in regular active service. Judge Lumbard declined to participate because of his connection with the litigation in the district court during his tenure as United States Attorney. Judge Moore became a member of the court on September 9, 1957, 245 F. 2d VIII. Opening briefs were filed January 8, 1958, and reply briefs on January 20, 1958. The case was submitted without oral argument.

On March 1, 1958, Judge Medina retired under 28 U.S.C. 371 (R. 135), which provides that a United States judge "may retain his office but retire from regular active service after attaining the age of seventy years . . ." Thereafter, on July 28, 1958, the court released its three-to-two *en banc* decision reversing the district court dismissals, 265 F. 2d 136 (R. 115-135). Judges Clark and Waterman dissented, believing that *Sword Line, supra*, in which earlier panel decision they had participated (retired Judge Learned Hand dissenting), was controlling in respect of the statute of limitations question (R. 126-135). The question of Judge Medina's eligibility to participate was raised for the first time in the dissent of Judge Clark.

The court held that "the rights of these charterers, so far as additional charter hire is concerned, are governed by Clause 13" (R. 123). As to the Government's argument that the words "final audit" in Clause 13 meant "each annual audit," the court thought that since this issue had not been raised below, it should be passed upon by the trial court after hearing whatever

evidence might be presented (R. 124).[5] And the court said, "But we think the text of Clause 13 is an adequate, *prima facie*, showing of jurisdiction in the absence of pleading and proof by the Government that libelant's interpretation of Clause 13 is incorrect" (R. 124).

All claims stated in the libels were held to be covered by Clause 13 except the one for expenditures for latent defects in the Blidberg case, which was held to have arisen at some unspecified date more than two years prior to the filing of the libel and therefore to be time barred (R. 125). The court added "However, this item, though not directly recoverable, may indirectly affect the proper computation of Blidberg's additional charter hire. To the extent that this is so, it may be necessary to litigate this expense for its impact on a proper computation of Blidberg's additional charter hire even though direct recovery of the expense be time barred" (R. 126).

The court found it unnecessary to pass upon the voluntary payment argument but said "We observe, however, that carried to its logical conclusion the contention is that every issue going to the merits is jurisdictional" (R. 122, n.).

On August 26, 1958, the Government filed a petition for further rehearing *en banc* (R. 137). On March

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[5] As to the "annual audit" issue, the Government's petition for further rehearing *en banc* (p. 7, n. 3) seemed to concede that the "annual audit" occurred concurrently with the "final audit":

> The opinion omits to state that this subordinate verbal controversy has little possibility of effect on any of these cases because there is the same necessary ten-year delay in each year's final audit (whether the first or, as libelants insist, the last is referred to), and the Government has contended throughout that any possible right to bring suit accrues at once at the time of payment.

26, 1959, the petition was denied, the court dividing as it had in the opinion of July 28, 1958 (R. 137-140). In both dissents Judge Clark expressed reluctance in raising the question of Judge Medina's eligibility and "even doubt as to the ultimate wisdom" of the policy, which he thought disqualified Judge Medina from participation in the decision (R. 135, 140).

3. The petitions for writs of certiorari.

The Government petitioned for certiorari solely on the question of Judge Medina's eligibility to participate in the decision below. Respondents, including American-Foreign Steamship Corp., filed conditional cross-petitions for certiorari (Docket Nos. 332 and 334), seeking review of the statute of limitations issue if the Government's petition should be granted. The Government stated that it would not object to the granting of the cross-petitions, since an early resolution of the limitations issue appeared desirable from the standpoint of the administration of justice. The Government's petition was granted (R. 142). Respondents' cross-petitions have not yet been acted upon.

SUMMARY OF ARGUMENT

The holding below is compelled by the language of section 46(c) and by case and statute law that require a judge to complete a case lawfully undertaken. *Shore* v. *Splain*, 258 Fed. 150 (D.C. Cir., 1919); *Frad* v. *Kelly*, 302 U.S. 312, 316-317 (1937); *United States ex rel. Pactan* v. *Watkins*, 164 F. 2d 457, 459-460, n. 1 (2 Cir., 1947), 28 U.S.C. 296. It is supported by the rule that a statute is not deemed to change a well-settled principle of law such as this one, absent clear evidence of an intent to do so. *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 509 (1932); *Ross* v. *Jones*, 89 U.S. 576 (1875);

United States v. *Thomas*, 82 U.S. 337 (1873). And its soundness is underscored by a recent recommendation of the Judicial Conference of the United States.

The Government's narrow position, on the other hand, lacks statutory and decisional and indeed rational support. Frankly admitted by the dissenting judges below to be undesirable (R. 135, 180), it requires a judge to hear a case, but bars him from deciding it; it requires the reconstitution, and even successive reconstitutions, of the court whenever a member retires or a new judge is added to the circuit; it thus makes unavoidable protracted delays in decision and hampers the policy of encouraging the retirement of judges.

The Government's groping for support in the statute and legislative history is strained and unavailing. Even a literal reading of section 46(c) does not require the result urged by the Government. The legislative history shows that the statute was intended to confirm the holding in *Textile Mills Sec. Corp.* v. *Comr. of Int. Rev.*, 314 U.S. 326 (1941); and the instant problem was not before either this Court or the Congress. On the other hand, the purpose of the *en banc* court is to resolve intra-circuit conflicts and to achieve finality of decision in the courts of appeals which generally are the courts of last resort (314 U.S. at 335). The Government's position would delay and impede rather than promote this objective.

These considerations apart, Judge Medina was, at the very least, a *de facto* judge and his participation in the decision below is not subject to attack here. *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891); *Ex parte Ward*, 173 U.S. 452, 455-456 (1899).

ARGUMENT

I. Judge Medina's Participation in the Decision Below Was Expressly Required by Statute

The Judicial Code is an integrated whole, not a collection of disparate and unrelated mandates. Its separate sections must be read together to effectuate their common purpose. Section 296 categorically and without qualification expresses the deeply-rooted principle that a judge shall complete the tasks he has begun.[6] There is nothing to suggest the existence of, nor indeed any reason to search for, a latent intent to except judges sitting *en banc* from this practical and sound rule.

But the Government's position is not supported even by reading section 46(c) in isolation. That section states merely that the *en banc* court shall consist of all active circuit judges. This necessarily and admittedly refers to the date of convening the court.

[6] Section 296 provides:

> A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.
>
> Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.
>
> A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

It does not, as the Government contends, require that the composition of the court must be later re-examined or that it is subject to change upon the retirement of one of its members.

The Government says that "the grant of power under 28 U.S.C. 46(c) extends to both the hearing *and the determination of cases*" (Br. 11). The premise that the power to hear and to decide must both be exercised is no doubt correct, but the argument that the date of decision is controlling actually rejects that premise and substitutes for it the insupportable position that the two functions may be split and that the power to hear must be exercised even absent the power to decide.

The Government does not question that Judge Medina was required by law to perform all the duties he undertook prior to his retirement, *i.e.*, consideration of respondents' petition for reconsideration *en banc* (October 9, 1957), participation in the decision granting the petition and becoming a member of the *en banc* court (December 19, 1957), and receipt and consideration of briefs (January 8, 1958, January 20, 1958). On the Government's theory, Judge Medina's eligibility to participate in the decision, and presumably the propriety of the constitution of the court,[7] must be determined as of the date of release of the decision; he was thus bound to hear and consider, but prohibited from deciding. This wholly illogical result is inconsistent with the purpose of the *en banc* procedure.

As pointed out in *Textile Mills Sec. Corp.* v. *Comr. of Int. Rev.*, 314 U.S. 326, 335 (1941), a significant purpose of *en banc* proceedings is avoidance of intra-

[7] The Government's equivocal position with respect to the date of determination of the propriety of the constitution of the court is discussed, *infra*, page 21.

circuit conflict and promotion of finality of decision in the courts of appeal which, in most cases, are the courts of last resort. But achievement of these goals is obstructed not aided by the further reconsideration, delay and possible reversal of opinion,[8] which are made inevitable by the Government's theory.

The practical means of achieving the goals is to judge the propriety of the constitution of the court and the eligibility of the judges, both to hear and to decide, as of the date when the court is convened. Neither the later retirement of a member of the court nor the appointment to the circuit of a new judge would then delay or otherwise interfere with the orderly completion of the case. And there would thus be no departure from the principle discussed below, to which we know of no exception, that a judge must complete a case that he has lawfully undertaken even though his authority in other respects has terminated, a principle restated in the plainest terms in section 296.

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[8] The likelihood of frequent recurrence of problems arising from retirement of judges and appointment of new judges is illustrated as follows. On May 15, 1959, less than two months after denial of the Government's petition for further rehearing *en banc*, Judge Hincks retired, 264 F. 2d VIII. Some four months later, on September 30, 1959, Judge Friendly took his oath of office as a judge of the Second Circuit, 268 F. 2d XII. Judge Clark reached the age of 70 on December 9, 1959, 28 *Who's Who in America*, 1954-1955, p. 485. He has not retired, although he has relinquished his duties as Chief Judge, presumably under 28 U.S.C. 45. There are now five judges on the Second Circuit who have not retired: Chief Judge Lumbard, Circuit Judges Clark, Waterman, Moore and Friendly. Since the statutory complement for the Second Circuit is six judges, 28 U.S.C. 44(a), there is still a vacancy. District Judge J. Joseph Smith was nominated on August 27, 1959 to fill this vacancy (New York Times, August 28, 1959) but he has not yet been confirmed. And there is legislation pending to add two additional judges to the Second Circuit. H.R. 6159, 86th Cong., 1st Sess.

The Government's counter-argument that the purposes of section 46(c) are to be achieved only by judges who, at the date of decision, have not yet retired rests upon a pseudo-literal reading of the statute. Actually, however, even a literal reading does not support it and, in any event, the Government's ritualistic approach ignores the rationale of *Textile Mills* (at page 324) that common sense must prevail over literalism.

The reasoning of Judge Schnackenberg in his dissent in *G. H. Miller & Company* v. *United States*, 260 F. 2d 286, 292 (7 Cir., 1958), *cert. denied* 359 U.S. 907, is most persuasive, particularly as applied to the narrower issue in the instant case.

> We are not justified in attributing to congress an intention, by § 46, to prevent a judge, who actively sits on the panel which decides an appeal, from participating in an *en banc* hearing on a petition for rehearing, the object of which is to overturn a major part of the panel's decision. A reading of both §§ 294 and 296, in conjunction with § 46, dispels any such legislative intention. The only reasonable construction which can be given to the entire pertinent legislative language, in its application to this case, is that the designation and assignment of Judge Major to this case bestowed upon him the duty of acting as a judge therein and in the consideration and disposition of such applications for rehearing as have been or will be filed therein. It would be incredible that congress intended that an experienced and capable retired judge, who voluntarily accepts an assignment to hear a case in his own circuit and in the decision of which he has joined, should be excluded from the consideration of a petition for rehearing thereof, whether or not it is to be heard by the original panel of which he is a member or the court sitting *en banc*. Such a result would be incongruous and contrary to common sense. * * *.

We believe with Judge Schnackenberg that the complete answer to the Government's argument is that Judge Medina did not, by reason of his retirement, cease to be an active judge in this case in which he was already engaged.[9] In *Herzog* v. *United States*, 235 F. 2d 664, 670, n. (9 Cir., 1956), *cert. denied* 352 U.S. 884; *Commercial Nat. Bank in Shreveport* v. *Connolly*, 177 F. 2d 514 (5 Cir., 1949); and *United States* v. *Sentinel Fire Ins. Co.*, 178 F. 2d 217, 239 (5 Cir., 1949), circuit judges participated in the *en banc* decisions although they had retired after commencement of the proceedings. See also *Bishop* v. *Bishop*, 257 F. 2d 495, 501-502 (3 Cir., 1958), *cert. denied* 359 U.S. 914, in which Judge Magruder of the First Circuit sat by designation as a member of a three-judge panel in the Third Circuit and then participated in the decision denying rehearing *en banc*. In *In re Sawyer*, 260 F. 2d 189, 203, n. 17 (9 Cir., 1958), *reversed on other grounds* 360 U.S. 622, Chief Judge Denman participated in a proceeding *en banc* and, having retired before announcement of the decision, did not participate in the decision because he, not the court, thought it inappropriate to do so.

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[9] It is unnecessary for this Court to decide whether a judge who retired before decision by a panel of which he was a member, is eligible to participate in *en banc* reconsideration of that appeal. The cases in which the retired judge did not participate are *Reardon* v. *California Tanker Company*, 260 F. 2d 369 (2 Cir., 1958), *cert. denied* 359 U.S. 926; *Harmar Drive-In Theater, Inc.* v. *Warner Bros.*, 241 F. 2d 937 (2 Cir., 1957), *cert. denied* 355 U.S. 824; *United States* v. *Gordon*, 253 F. 2d 177, 191-192 (7 Cir., 1958), *reversed on other grounds* 344 U.S. 414; *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286, 305-307 (7 Cir., 1958), *cert. denied* 359 U.S. 907.

But see the recommendation of the Judicial Conference of the United States, discussed, *infra*, at page 19.

II. The Propriety of Judge Medina's Participation in the Decision Below Is Fully Supported by Established Principles of Law

The legislative history relied upon by the Government is inconclusive and unpersuasive. The reviser's note shows that the *en banc* provision of section 46(c) was enacted to give statutory expression to this Court's holding in *Textile Mills Sec. Corp.* v. *Comr. of Int. Rev.*, 314 U.S. 326 (1941), that a court of appeals might lawfully consist of more than three judges sitting *en banc* and the questions now before the Court were not presented in that case. *Western P.R. Corp.* v. *Western P.R. Co.*, 345 U.S. 247 (1953).

Nevertheless, there are other means of ascertaining the legislative intent, one of which seems well nigh conclusive here. The principle is long-settled that a properly qualified judge who hears a case has not only the right but the duty to complete it, notwithstanding that some intervening event may have disqualified him from hearing any new cases. It is also a well-settled principle of statutory construction that, unless there is clear evidence of intent to do so, a statute will not be construed to change established principles of law.

This Court stated the latter rule in *Thompson* v. *United States*, 246 U.S. 547, 551 (1918):

> . . . we cannot doubt that if the Congress had intended . . . to change the law as evidenced by the Whitfield decision, of which we must assume that it had full knowledge (Chesapeake & P. Teleph. Co. v. Manning, 186 U.S. 238, 245, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881), it would have done so in plain terms, especially in a matter of such great importance as we have here . . .

This principle has been frequently reiterated. *United States* v. *Thomas*, 82 U.S. 337 (1873); *Ross* v. *Jones*, 89 U.S. 576 (1875); *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Cumberland Telephone & Telegraph Co.* v. *Kelly*, 160 Fed. 316, 321 (6 Cir., 1908); *Globe & Rutgers Fire Ins. Co.* v. *Draper*, 66 F.2d 985, 991 (9 Cir., 1933); *Thummess* v. *Von Hoffman*, 109 F.2d 291, 292 (3 Cir., 1940); *Schwartz* v. *Inspiration Gold Mining Co.*, 15 F. Supp. 1030, 1034 (Mont., 1936); *In Re Big Blue Min. Co.*, 16 F. Supp. 50-52 (N.D. Cal., 1936).

That a judge must complete his unfinished cases, notwithstanding the termination of his authority to begin new ones, has also been frequently and authoritatively stated. In *Shore* v. *Splain*, 258 Fed. 150 (D.C. Cir., 1919), a municipal court judge had presided at a police court trial under a designation which authorized him "to discharge the duties of either of the judges of the police court during their sickness, vacation, or disability . . ." The convicted defendant was sentenced by the municipal court judge on September 7, 1918, on which date the two regular police judges were in court discharging their duties. The defendant brought a writ of habeas corpus which was dismissed by the Supreme Court of the District of Columbia. The Court of Appeals, rejecting an argument similar to that urged by the Government at bar, held (page 152):

> According to the appellant the moment the disability of the regular judge is removed, the power of the designated or special judge ceases, even though he may be in the midst of an important trial thus rendering nugatory all that had been done in the trial up to that time. Such a construction would lead to great public inconvenience and

should not be adopted if it can be avoided. Hawaii v. Mankichi, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016; Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; Bird v. United States, 187 U. S. 118, 124, 23 Sup. Ct. 42, 47 L. Ed. 100.

It was undoubtedly the intention of Congress in providing for a temporary judge, that he should perform the duties of the position during his incumbency and complete any work entered upon by him before he withdrew from the place; otherwise, as in the case of a trial, much of his effort might come to naught if the return to duty of the regular judge had the effect of terminating his authority, and thus the purpose of Congress in providing for a substitute judge would be defeated in many cases. The fact that this interpretation may authorize the presence temporarily of three de jure judges of the court does not militate against it, for Congress has the power to provide for as many judges of the court as it may think proper.

State v. *Stevenson*, 64 W. Va. 392, 62 S.E. 688 (1908), upheld the corollary position that a regular judge was without power to sentence a prisoner who had pleaded guilty to a special judge serving in his absence. Reversing the judgment of conviction, the court held that, although the appearance of the regular judge "operated to vacate the office of the special judge", nevertheless the rule is "that the return of the regular judge did not oust the special judge of jurisdiction to try and finally dispose of any case begun before him".

And it was said in *State* v. *Butner*, 67 Nev. 436, 220 P.2d 631, 632 (1950), n. 2:

> . . . The general rule appears to be that the special or pro tempore judge retains jurisdiction until the final determination of the case. See Annotation

134 A.L.R. 1130; Fisher v. Puget Sound Etc. Co., 34 Wash. 578, 76 P. 107. The texts appear unanimously to support this view.

In *State* v. *Bobbitt*, 215 Mo. 10, 114 S.W. 511 (1908), the rule was applied where a judge of one county circuit court tried a case in another circuit court because of the illness of the regular judge. He had been authorized to act as substitute for a period which ended with the August term of the latter court. Rejecting the contention that the signing of a bill of exceptions on April 1 of the following year was without authority and void, the court held that no judge other than the visiting judge who had tried the case had authority to allow and sign the bill of exceptions.

Many other decisions support the foregoing rule. *Frad* v. *Kelly*, 302 U.S. 312, 316-317 (1937); *United States ex rel. Pactau* v. *Watkins*, 164 F.2d 457, 459-460, n. 1 (2 Cir., 1947); *United States* v. *Marachowsky*, 213 F.2d 235, 244 (7 Cir., 1954); *United States* v. *Garsson*, 291 Fed. 646, 647, 648 (S.D.N.Y., 1923); *Hicks* v. *United States Shipping Board Emergency Fleet Corp.*, 14 F.2d 316, 317 (S.D.N.Y., 1926); *Sunrise Mayonnaise* v. *Swift & Co.*, 88 F. Supp. 187, 189 (E.D. Pa., 1949); *Cheesman* v. *Hart*, 42 Fed. 98, 105-106 (Cir. Ct. Colo., 1890), *cert. denied* 163 U.S. 704; *State* v. *Fidelity & Deposit Co.*, 136 Mo. App. 330, 117 S.W. 618 (1909); *Fisher* v. *Puget Sound Brick, Tile & Terra Cotta Co.*, 34 Wash. 578, 76 Pac. 107 (1904); *Brunswick Village* v. *Knof*, 29 N.J. Super. 238, 102 A.2d 383 (1954). And the principle for which all of these cases stand has long been a part of our statute law. 28 U.S.C. 296.

That principle was given renewed endorsement by the Judicial Conference of the United States,[19] which, at its meeting of September 16-17, 1959, approved a report by Judge Maris on behalf of the Committees on Court Administration and Revision of the Laws, stating:

> . . . the Committees thought it proper to permit a retired circuit judge to be a member of the court of appeals sitting in banc in the rehearing of a case in which he has sat, by assignment, in the panel of the court which heard the case originally.

The Conference also approved the draft of a bill presented by the Committees, *clarifying* the status of retired judges in accordance with the views of the Conference. House Doc. No. 321, 86th Cong., 2d Sess., pages 7, 9-11. *A fortiori*, the view of the Conference would clearly be that Judge Medina, who was active when the *en banc* court was convened, was eligible to participate in the decision.

There is nothing in section 46(c) or indeed in any other provision of the Judicial Code that even remotely suggests an intention to abrogate or modify the rule that a judge must complete a case lawfully undertaken. The contrary intent is evidenced by the fact that the Congress failed to except judges sitting *en banc* from the provisions of section 296. And the applicable statutes have been and still are completely consistent with the intention to adhere to this sound rule.

[19] Judge Clark of the Second Circuit participated in this Conference. House Doc. No. 321, 86th Cong., 2d Sess., page 6.

III. Practical Considerations Also Support Judge Medina's Eligibility

This Court said in *Textile Mills Sec. Corp.* v. *Comr. of Int. Rev.*, 314 U.S. 326, 335 (1941):

> Such [practical] considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting en banc. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation.

So, here, at the very least, respondents' "case on the statute is not foreclosed". And practical considerations may appropriately be weighed. These considerations are that the Government's position makes inevitable and respondents' position avoids, inordinate delays in reaching final decisions and impediments to retirement.

The Government indicates that, if the decision below should be reversed and the case remanded, a disposition could be made of the instant case without further delay. On the contrary, in that event, we think that the appeal would have to be reconsidered by an *en banc* court participated in by Judge Friendly and all other judges who are still "active" at the date of decision.

But even if additional delay could be avoided here, that still would not be dispositive. The Government's petition for certiorari was grounded exclusively upon the contention that "this case raises a question of general importance in the administration of justice by the courts of appeals" (page 7), and its brief on the merits notes the absence of "decisions treating the precisely identical *en banc* issue posed in this case" (page 23,

n. 23). A decision that will resolve questions of general importance must therefore rest upon a consideration of all possible factual situations even if they are not actually present here. It is necessary, therefore, to consider the situation in which, before decision by an *en banc* court, a member retires and a new judge is appointed to the circuit.

The Government equivocally offers two possible solutions: that the court "might proceed to decision on the merit[s] without the participation of either the retired judge or his successor, or it might permit the new active judge to participate (possibly without reargument, at least in a case such as this, which has been submitted on briefs to the court en banc)" (Br. 14).

The first alternative results in an irreconcilable conflict. Section 46(c) provides in relevant part that "A court in banc shall consist of all active circuit judges of the circuit". Whatever the resolution of the issue as to the date on which this condition must be met, we think it hopelessly compounds confusion to assert that one date should be determinative with respect to the retired judge and another as to the new judge. Yet, the Government states categorically that Judge Medina's eligibility must be determined as of the date of decision; on the other hand, it concedes that, as to new judges, compliance with the requirement that the court consist of all active judges may be determined as of some earlier date.

The Government cannot escape the conclusion of consistency, that if the retired judge is ineligible it is because the decision date is determinative and therefore the new judge must be included in the court; and

that if the new judge need not be included it is because the date of convening is determinative, in which case the retired judge remains eligible.

This leaves only the Government's alternative suggestion that the new judge participate, possibly without hearing argument. It is unnecessary to labor the point that, with or without argument, the exclusion of an experienced judge familiar with the case and the addition of a new judge to the *en banc* court would necessarily mean further delay. The new judge would have to familiarize himself with the record and the briefs and might very well want the benefit of a discussion of the case in conference. He might also present a point of view not theretofore considered. And, the delay, thus made unavoidable, would be further prolonged if, meanwhile, another judge were appointed to the circuit or another judge retired.[11]

The construction urged by the Government also would almost inevitably impede the congressional policy to encourage the retirement of judges under 28 U.S.C. 371.[12] This policy enables the courts better to

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[11] The instant case was argued before a three-judge panel on January 15, 1957. The Government's petition for further rehearing *en banc* was denied March 26, 1959, more than two years later. Since the latter date Judge Hincks has retired, Judge Friendly has been added to the circuit and there is an unfilled vacancy.

[12] 28 U.S.C. 371 provides:

§ 371. *Resignation or retirement for age*

(a) Any justice or judge of the United States appointed to hold office during good behavior who resigns after attaining the age of seventy years and after serving at least ten years continuously or otherwise shall, during the remainder of his lifetime, continue to receive the salary which he was receiving when he resigned.

(b) Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire

cope with their heavy responsibilities. It retains the services and wisdom of the retired judges and at the same time adds new judges to the bench.

However, it seems likely that judges who are planning to retire would be reluctant to do so if, as a result, they would have to withdraw from cases in which they are sitting, particularly if, as is so often the case in *en banc* proceedings, the issues are important and the court is divided. And the problem would be magnified if the withdrawal of a judge might change the result.

Judge Medina believed that his retirement did not make him ineligible to join in the decision. Had he been of the contrary opinion, it is doubtful that he would have retired because the result would have been to restore the earlier 2-2 deadlock (Judges Hincks and Medina against Judges Clark and Waterman).[13] Judge Medina would then have had to defer his retirement for a year, until after denial on March 26, 1959, of the Government's petition for further rehearing *en banc*.

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from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise, or after attaining the age of sixty-five years and after serving at least fifteen years continuously or otherwise. He shall, during the remainder of his lifetime, continue to receive the salary of the office. The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires.

[13] It was no doubt this deadlock that accounted for the three-judge court's reluctant acquiescence on September 25, 1957, in *Sword Line* and *American Eastern*, *supra*, which were later overruled. And it was probably the accession of Judge Moore on September 9, 1957, 245 F. 2d VIII, that accounted for the granting of respondents' petition for reconsideration *en banc*.

In the instant case the *en banc* proceedings added more than 15 months to the time theretofore consumed in the determination of the appeal. The extent of the possible delay in other cases is indicated by the report of the Director of the Administrative Office of the United States Courts for the fiscal year ended June 30, 1959, which stated:

> "For cases terminated after hearing or submission in all courts of appeals in 1959, the median [time interval from the filing of the complete record to final disposition] was 6.7 months". (House Doc. No. 321, 86th Cong., 2d Sess., page 4)

Section 46(c) does not authorize an eligible judge to decline to participate in an *en banc* proceeding because he intends soon to retire. And if, prior to decision in a pending *en banc* case, another case is ordered to be considered *en banc*, his retirement might (if the Government's interpretation of the statute were accepted) be further deferred. Indeed, on the basis of the median time for all appeals, it would take but two *en banc* cases per year, appropriately spaced, to defer his retirement indefinitely.[14]

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[14] In the fiscal year ending June 30, 1959, 22 cases were ordered heard *en banc* as follows:

Circuit	*En Banc Hearings*
D.C.	5
3rd	4
8th	2
9th	8
10th	3
Total	22

One *en banc* proceeding was begun over a year ago and is still undecided, one lasted a year, and ten lasted three months or longer. The cases are listed in Appendix A.

There should be compelling support, which is wholly absent here, for a construction of the statute which makes inevitable such undesirable results.

IV. Judge Medina Was at Least a Judge De Facto and the Propriety of His Participation in the Decision Below Is Not Open to Attack Here

Judge Medina, as the Government admits, had lawfully participated in the hearing of the case *en banc*, as required by statute. Even if it were correct to say that his retirement terminated his status as an active judge with respect to the final decision, he remained at least a *de facto* judge and the *en banc* decision should be sustained on this further ground. *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891); *Ex Parte Ward*, 173 U.S. 452, 455-456 (1899); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 266 F.2d 427, 430-431, n. 1 (3 Cir., 1959); *Shore* v. *Splain*, 258 Fed. 150, 151-154 (D.C. Cir., 1919).

The Government argues that the *de facto* doctrine "does not reach the situation, such as the instant case, where a judge is expressly precluded from a special type of judicial action by legislative mandate" (Br. 28). Even if the Government were correct as to the interpretation of the statute, nevertheless its conclusion is contrary to the authorities. In *Ball* v. *United States*, *supra*, a statute permitted a judge, during the disability of another judge, to be designated to sit in the latter's district. The disabled judge died but this Court held that the substitute was authorized to continue to sit thereafter.[15] The Court held that the substitute was "judge de facto, if not de jure".

[15] The report of the case at page 128 appears to contain a typographical error. It states that Judge Sabin died March 30, 1889. From the context it would seem that he actually died March 30, 1890.

Similarly, in *Shore* v. *Splain, supra,* the relevant statute provided that a municipal court judge could be designated to serve in the place of one of the two police court judges "In case of sickness, absence, disability, expiration of term of service . . . or death". The question was whether, under this statute, the substitute municipal court judge, when both police court judges were on the bench, could sentence the defendant whom he had tried in the absence of one of them. It was held that he was a *de jure* judge when he sentenced the defendant "but, if not, he was at least a de facto one".

The cases relied upon by the Government (Br. 26-27) are not in point. Moreover, in none of them was the *de facto* question discussed or seemingly raised or considered.

Thus, for example, in *Frad* v. *Kelly*, 302 U.S. 312 (1937), it was held that a judge who sat by designation in a district other than his own, and tried and sentenced the defendant, had no authority, after his designation had expired and he had returned to his own district, to entertain a petition for discharge from probation. The decision turned on the holding that such a petition was a new matter, as to which, being without the color of initial authority, he was in the position of a usurper.

In *Case* v. *Hoffman,* 100 Wis. 314, a judge, who had tried a case in a lower court, participated in its hearing on appeal in violation of statute. He had no right to hear the appeal *ab initio.* The fact that he had tried the case, far from giving him any color of right to continue with it on appeal, disqualified him from doing so. Here, too, the judge's position was that of a usurper.

In *Watson* v. *Payne,* 94 Vt. 299, the relevant statute provided that a justice of the peace could not try a

case appealable to a county court. A justice of the peace tried such a case and here, too, he was held to be a usurper because of his lack of authority *ab initio* to hear the case.

And in *In re Woodside-Florence Irrigation District*, 121 Mont. 346, a statute required a judge to withdraw from a case upon the filing of an affidavit of prejudice. Such an affidavit was filed, but the trial judge declined to withdraw. It was held that he was a usurper.

CONCLUSION

For the foregoing reasons, the judgment below was proper and should be affirmed. However, the Court may dispose of the case in such manner "as justice may at this time require". *Langnes* v. *Green*, 282 U.S. 531 (1931); *United States* v. *Carnigan*, 342 U.S. 36, 38 (1951); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 330 (1936). If it should be held that the decision below is affected by some infirmity in the *en banc* proceedings, it still may properly be affirmed on the ground that the case was correctly decided on the merits. In the alternative, respondents' cross-petition for certiorari should be granted.

Respectfully submitted,

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